No. 4112.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HON WON CHONG and GEE SUE TOM,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE.

On May 16, 1922, the plaintiffs in error were indicted by the Grand Jury of the United States, charging that Hon Won Chong and Gee Sue Tom on or about May 1st, 1922,

> "at San Francisco in the Southern Division of the Northern District of California then and there being, did then and there * * * conspire * * * and agree together and with divers other persons unknown to the Grand Jurors * * * to commit acts made offenses and crimes by the Laws of the United States, to-wit: the Act of Congress of December 17, 1914, as amended February 24, 1919, to unlawfully, wilfully and feloniously have *in their possession* certain narcotic drugs, * * * not * * * having paid the special tax provided * * *."
>
> "That said conspiracy * * * between the

> said defendants and divers other persons * * * *was continuous* * * * from and after the first day of May, 1922 * * * that in furtherance of said conspiracy * * * and to effect and accomplish the object thereof, the said defendants, and each of them, did, on or about May 1st, 1922 at *San Francisco* * * * unlawfully * * * have in their possession certain derivative of coca leaves."

On July 6, 1922, plaintiffs in error were duly arraigned and pleaded "not guilty". Said case was continued to July 15, 1922, to be set for trial. (Tr. pp. 8-9.)

On October 11, 1922, plaintiffs in error were again arraigned and pleaded "not guilty" and the case was continued to October 28, 1922, to be set for trial. (Tr. p. 11.)

On March 22, 1923, the case came on regularly for trial. (Tr. p. 12.)

On March 23, 1923, the case came on regularly for further trial. (Tr. p. 14.) The Government thereupon rested their case. Attorneys for plaintiffs in error moved the court for instructed verdict of "not guilty" and motion was denied and exception entered. Attorneys for plaintiffs in error thereupon moved the court for an order quashing the indictment. (Tr. p. 14.)

On March 27, 1923, the case came on regularly for further trial. (Tr. p. 15.) Attorney for the Government made a motion requesting the Court to deny the motion to quash and requested an order *consolidating* case No. 11785 with case No. 11132, then on trial. The Court ordered the plaintiffs in

error motions to *dismiss* and *quash* indictment be denied and permitted the Government's motion to consolidate nunc pro tunc as of the commencement of trial. Attorneys for plaintiffs in error entered exceptions to the consolidation and again moved the Court for an order quashing and abating the consolidated indictments, and requested an instructed verdict for plaintiffs in error, which request was denied. Attorneys for plaintiffs in error entered a plea in bar under indictment No. 11132. (Tr. pp. 15-16.)

On March 28, 1923, the case came on regularly for further trial *under consolidated indictments* No. 11132 and No. 11785 and plaintiffs in error were found "guilty" on the consolidated indictments. Case was continued to April 7, 1923, for pronouncing of judgments. (Tr. pp. 17-18-19.)

On April 7, 1923, the case came on regularly for pronouncing of judgment and attorneys for plaintiffs in error presented a motion in arrest of judgment, which motion was denied and exception reserved; thereupon judgment was given upon said verdict whereby the plaintiffs in error were sentenced to be imprisoned for a period of two years in the United States Penitentiary at McNeil Island, State of Washington. Plaintiffs in error prosecute their writ of error herein to secure a reversal of said judgment. The witnesses on behalf of the Government gave testimony tending to show that on May 3, 1922, a special delivery letter was delivered to Gee Sue Tom, which letter contained a baggage check and key. The baggage check was presented to the Western Pacific baggage station at Reno, Nevada, and corresponded with

a baggage check attached to a suitcase which contained narcotics. (Tr. pp. 59-60-61.)

The postmark on the envelope showed "Stockton, May 2nd, 9.30 a. m., Calif.", and "Reno, Nevada, May 3rd, 7.00 a. m., 1922, rec'd." and was addressed to Gee Toy, c/o Chow Kee, 129 *First* St., Reno, Nevada, and the return address was "From F. T. Henry, 1040 Stockton Street, S. F., Cal." (Tr. pp. 62-63.)

On May 9, 1922, narcotic inspector H. Haley prepared a FICTITIOUS registered letter addressed to F. T. Henry, 1040 Stockton Street, San Francisco, California.

H. S. Keyes, a former Internal Revenue Agent, dressed in the uniform of a mail carrier, went to Room 38, 1040 Stockton Street, San Francisco, about 10 a. m. on May 9, to deliver the FICTITIOUS letter, but on his first visit he did not find F. T. Henry. (Tr. p. 75.) Agent Keyes returned to Room 38, at 1040 Stockton Street, about 1:00 p. m. on the same day, and plaintiff in error, Hon Won Chong, identified himself to Keyes as F. T. Henry, and signed "a registry *return* card" (Government's Exhibit No. 8), after which Agent Keyes delivered to Hon Won Chong the FICTITIOUS registered letter, but which letter Hon Won Chong never attempted to open in Agent Keyes' presence. (Tr. pp. 75-76-77.)

Narcotic Inspector H. Haley assisted Agents Halstead and Keyes in searching the pockets of Hon Won Chong at the time of his arrest, and from a bunch of papers taken from his pocket they found a *railroad ticket* (Government's Exhibit No. 5) (Tr. pp. 65-76), which ticket was a Western Pacific Railroad ticket

from Oakland to Reno. The Government agents did not find anything else on the person of Hon Won Chong, bearing the name of F. T. Henry. (Tr. p. 78.) Inspector Haley searched room 38 at 1040 Stockton Street, *but found no narcotics.* (Tr. p. 67.)

J. H. McNichols, railroad baggage agent for the Western Pacific at Oakland, identified the *valuation slip* as the one which was presented by the passenger presenting the ticket and McNichols remembered that there were two Chinamen present at the time the suitcase was checked and he (personally) *saw* the Chinaman sign the VALUATION SLIP, who stood right in front of him, but McNichols COULD NOT IDENTIFY PLAINTIFF IN ERROR, HON WON CHONG, AS THE MAN WHO SIGNED THE VALUATION SLIP. (Tr. pp. 78-79.) McNichols presented the *valuation certificate* to one of the Chinamen who said he couldn't write, but after a conversation with the other Chinamen, he came forward and signed the valuation slip with the name F. T. Henry. (Tr. pp. 91-92.)

Plaintiffs in error introduced evidence tending to deny each and every incriminatory fact. The evidence introduced shows that plaintiff in error, Hon Won Chong, arrived in San Francisco from China about March 15, 1923. That he stayed in San Francisco about eleven or twelve days, and then went to Vallejo about March 25th or 26th, where he worked as a cook in a Chinese store. He returned to San Francisco about May 6th or 7th, and was not in San Francisco on May 1st, 2nd or 3rd. He never saw the plaintiff in error, Gee Sue Tom, before he met him in the

courtroom in San Francisco during September, 1923, nor had he ever signed the name F. T. Henry prior to May 9th. (Tr. pp. 93-94.) The letter (Government's Exhibit No. 6) was not in his handwriting. He had never been in Oakland or Reno, Nevada. The railroad ticket which was taken from his person was given to him by Fong Ting, who told him to keep the ticket and watch Fong Ting's room until he returned to the city, and instructed Hon Won Chong that if any mail came for F. T. Henry, that he was to sign for it and take care of the letter until Fong Ting returned. Hon Won Chong is a married man BUT HIS WIFE AND CHILDREN ARE IN CHINA, and were not at 1040 Stockton Street, San Francisco, California, on May 9th.

Specifications of Errors Relied Upon.

1. That the trial Court erred in refusing to grant the motion for a directed verdict on behalf of plaintiffs in error, which motion was first made at the conclusion of the Government's case and thereafter renewed when all the evidence was in.

2. That the Court erred in making, giving and rendering judgment against the defendants for the reason that said indictment does not state any crime or any offense against any law of the United States, and for the reasons taken and assigned by the defendants in their motion in arrest of judgment.

I.

That the Trial Court Erred in Refusing to Grant the Motion for a Directed Verdict on Behalf of Plaintiffs in Error, Which Motion Was First Made at the Conclusion of the Government's Case and Thereafter Renewed When All the Evidence Was in.

1. That the evidence adduced fails to prove a conspiracy as charged in the indictment.

The evidence only shows that a special delivery ENVELOPE was addressed to Gee Toy, 129 *First* Street, Reno, Nevada, ostensibly from F. T. Henry, 1040 Stockton Street, San Francisco, California, to be delivered to Duck Suy, which letter had been mailed at Stockton, California, on May 2, 1922, and contained a letter addressed to Duck Sung, written by one Jak Hing, "Now, I forward by railroad express, one suitcase and kindly get it containing goods to value of $1112.00 * * * please send me a check for the above."

The evidence also shows that there was a suitcase checked at Oakland, California, on May 1, 1922, on Western Pacific Railroad Ticket No. 182646, on which apparently baggage check No. 409250 was issued, and which baggage check, the stub of which corresponded with the attached portion on a suitcase which Internal Revenue Inspector Haley procured at Reno, Nevada, on May 3, 1923. The suitcase obtained by Inspector Haley contained the narcotics referred to in the indictment.

At the time the suitcase was checked at Oakland, California, on May 1st, a VALUATION SLIP was signed by the Chinese who checked the suitcase, and

the said valuation slip was signed in the presence of the Western Pacific baggage agent by a Chinese who stood in front of the baggage agent, and which Chinese could not be identified as the plaintiff in error Hon Won Chong.

On May 9, 1922, a fictitious registered letter addressed to F. T. Henry, 1040 Stockton Street, San Francisco, California (Exhibit No. 4), from Chu Kee Co., Reno, Nevada, upon which appeared in Chinese characters "deliver this letter to Soo Hoo Yee Wai." This fictitious registered letter was prepared by the Government agents and Mr. Keyes delivered it to 1040 Stockton Street, San Francisco, California. When Mr. Keyes first called at 1040 Stockton Street at about 10.00 o'clock a. m. on May 9, 1922, he did not find F. T. Henry at home, BUT A WOMAN ANSWERED THE DOOR WHO SAID SHE WAS THE WIFE OF F. T. HENRY. Mr. Keyes returned to 1040 Stockton Street about 1.00 o'clock p. m. of the same afternoon and delivered the REGISTRY RECEIPT to a man, who Mr. Keyes said identified himself as F. T. Henry, and who signed the registry receipt in his, Mr. Keyes', presence. Hon Won Chong never attempted to open the letter, but was immediately placed under arrest by the inspector. After his arrest, they searched his person and found a bundle of papers which contained a railroad ticket (Exhibit No. 5), BUT THEY FOUND NO OTHER PAPERS OR DOCUMENTS BEARING THE NAME OF F. T. HENRY, NEITHER DID THEY FIND ANY NARCOTICS IN THE ROOM AT APART-

MENT 38, WHERE THE SAID HON WON CHONG WAS AT THE TIME HE SIGNED THE REGISTRY RECEIPT.

A conspiracy has been defined as:

> "A combination of two or more persons, by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." (5 R. C. L. 1061.)

or as the Honorable Court defined it:

> "An agreement or combination between two or more persons to do an unlawful act, or to do a lawful act by unlawful means."

Now, the essential ingredients of the crime of conspiracy are:

> "1. An object to be accomplished which must be (a) the commission of an offense against the United States.
> 2. A plan or scheme embodying means to accomplish the object.
> 3. An agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object or the means embodied in the scheme, or by any effectual means.
> 4. An overt act by one or more of the conspirators to effect the object of the conspiracy, and,
> 5. Guilty intent present in the minds of the conspirators." (*U. S.* v. *Newton,* 52 Fed. 275.)

Now, applying the evidence introduced by the Government to the ESSENTIALS to be met in

proving the charge of conspiracy, the Government did not prove a conspiracy as charged in the indictment.

1. The evidence tersely stated shows:

(a) That there was a special delivery "envelope" (not letter) addressed to a Gee Toy at Reno, Nevada, to be delivered to one Duck Suy, which envelope was mailed from Stockton, California (not San Francisco), on May 2, 1922, which envelope contained a letter addressed to "Duck Sung" written by one "Jak Hing."

(b) That there was a suitcase containing narcotics, checked at Oakland, California, for which a valuation certificate was signed in the handwriting of some unknown person on May 1, 1922, on Western Pacific Railroad ticket, for which a baggage check was issued and presented on the suitcase, which baggage check was taken from an envelope at Reno, Nevada, by Government officers.

(c) That a fictitious registered letter was prepared by Government officials, addressed in English to F. T. Henry, 1040 Stockton Street, San Francisco, supposedly from Chu Kee Co., Reno, Nevada, with the notation appearing on the envelope in Chinese "to be delivered to Soo Hoo Yee Wai."

(d) That the said fictitious letter was delivered to Hon Won Chong on May 9, 1922, after he had signed a "registry receipt" when he told the Government agent that he was F. T. Henry, and after Hon Won Chong was arrested, he was searched, and the Western Pacific Railroad ticket introduced in evidence by the Government, upon which it was claimed the suitcase was checked, was found in Hon Won Chong's pocket.

Analyzing the said facts, and applying them to

the ingredients necessary to prove the crime of conspiracy, alleged in the indictment, what develops?

Essential 1. The object to be accomplished—

> "Unlawfully conspired to possess narcotic drugs non-taxpaid."

There was not one iota of evidence introduced during the whole trial to show that Hon Won Chong or Gee Sue Tom ever possessed any narcotic drugs not bearing tax-paid stamps. The evidence introduced showed that Hon Won Chong had in his possession (a) railroad ticket, and (b) answered to the name of F. T. Henry. The evidence also shows that the person who signed the "valuation certificate" at Oakland, was an unidentified Chinese, whose handwriting was not the same, or similar to the handwriting of Hon Won Chong, who signed the "registry receipt" for the fictitious F. T. Henry letter prepared and delivered by the Government officials, which resulted in the arrest of Hon Won Chong.

There is a conflict of evidence as to whether Gee Sue Tom is Gee Toy or not. Gee Sue Tom is a registered voter in Reno, Nevada, under the name of "Tom Sue." A registered letter was forcefully delivered to him by the Government officers WHICH LETTER HAD BEEN OPENED BY THE SAID OFFICIALS PRIOR TO DELIVERY TO HIM, which ENVELOPE contained the claimant's portion of the baggage check corresponding with the baggage check on the suitcase procured by the Government officials (not by either of these defendants) from the Western Pacific Railroad station at Reno, Nevada.

No evidence of any kind was introduced to show that the above defendants, or either of them, ever possessed the narcotics contained in the suitcase, or that either of them ever *actually* possessed the claimant's portion of the "baggage check" which the Court said:

> "possession of such check with knowledge of the contents of the suitcase, and an intent to procure the suitcase, is in law possession of the drugs."

At the best, the only possession which was proven, was "constructive" possession, and how can it be said that Gee Sue Tom had knowledge of the contents of the suitcase when he had never read the letter nor had had the suitcase in his possession, nor knew what was in the suitcase?

Essential 2. A plan or scheme embodying means to accomplish the object.

The evidence introduced by the Government shows that some unidentified person checked a suitcase from Oakland, California, to Reno, Nevada, which suitcase contained narcotic drugs, by an unidentified person who signed a "valuation certificate" at Oakland, California, which signature was not in the handwriting of either Hon Won Chong or Gee Sue Tom. That there was a registered letter mailed from Stockton, California (not San Francisco), on May 2, 1922, by some unidentified person which letter was received at the post office at Reno, Nevada, on May 3, 1922, and was taken to the police station "unopened" and was left with the "patrolman or desk sergeant" about 8.30 a. m. on May 3rd. The said registered letter was

then returned to the post office at Reno about 10.30 a. m. of the same date, when there was a sticker placed over the side of the envelope where it had been opened by the "Chief of Police" or "Government Agent." This registered letter was then taken to "129 East FRONT Street" instead of "129 East FIRST Street," where there is a store owned by one Gee Fook Sang, under the name of Chu Kee Co. This said Gee Fook Sang is a brother-in-law of Gee Sue Tom. Gee Sue Tom was in the store alone, when the special delivery letter was left with him by the messenger boy. No evidence was introduced to show that the letter was for him, or that he attempted to open the letter, because the Government agents were so close behind the special delivery letter boy that it was impossible for Gee Sue Tom to open the letter before he was arrested. MR. HALEY OPENED THE LETTER HIMSELF AND TOOK THE BAGGAGE CHECK OUT OF IT, AND WENT TO THE WESTERN PACIFIC DEPOT AT RENO, AND GOT THE SUITCASE.

There was no evidence introduced to show that either or both of the defendants "schemed" in any way or manner to ship the suitcase containing the alleged narcotics from Oakland, California, to Reno, Nevada, or that they schemed to accomplish the object of procuring the registered letter containing the claim check, but on the contrary, the evidence does show that the Government officers schemed to force the two defendants into accepting the "envelope addressed to Gee Toy from Stockton, California, containing a letter addressed to Duck Sung, enclosing a statement

amounting to $1112.00, and requesting a check in payment thereof" which envelope contained directions to deliver the registered letter to Duck Suy. The evidence further shows that a fictitious registered letter was prepared and delivered by the Government officers at apartment 38, 1040 Stockton Street, San Francisco, California, on May 9, 1922, to Hon Won Chong for F. T. Henry in an envelope directing that the said letter be delivered to Soo Hoo Yee Wai.

Essential 3. An agreement or understanding between two or more persons, whereby they become definitely committed to cooperate for the accomplishment of the object of possessing narcotic drugs non-taxpaid.

There was no evidence introduced to show that Hon Won Chong or Gee Sue Tom ever entered into any understanding or agreement with each other, or with any other persons to POSSESS narcotic drugs unlawfully, but on the contrary, the evidence shows that Hon Won Chong came to the United States from China, and was landed on February 15, 1922, on the S. S. "Hoosier State" at the Immigration Station, Angel Island, and came to San Francisco on March 15, 1922. Then he went to Vallejo about March 25th and returned to San Francisco about May 7th.

The Government agents said that Hon Won Chong told them he had lived in Bakersfield. What connection having been in Bakersfield has to do with a checking of a suitcase in Oakland, California, or the mailing of a registered letter in Stockton, California, does not appear, and the only purpose which this evidence

could serve would be for the purpose of impeachment, but before a witness may be impeached, the proper foundation must first be laid by calling the witness' attention to the time and place where the statement was made, and if he answers the question in the negative then the said evidence can be introduced for impeachment purposes, but none of these requirements, however, were met.

The Court said in *The Charles Morgan* v. *Kouns,* 115 U. S. 69, that:

> "The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it. *Conrad* v. *Griffey,* 16 Howard 46."

Gee Sue Tom was last in San Francisco about the month of September, 1921. There was no evidence introduced at any time on the part of the Government to show that these two defendants or anyone else had ever been in communication with each other directly or indirectly, or that they had ever became definitely committed to cooperate to accomplish the object of the conspiracy charged in the indictment No. 11132.

Essential 4. An overt act by one or more of the conspirators to effect the object of the conspiracy.

The overt act charged in the indictment alleges that in furtherance of said conspiracy, the said defendants,

and each of them, did, on or about May 1, 1922, at San Francisco, unlawfully and wilfully POSSESS certain narcotic drugs which were non-taxpaid. There was not a scintilla of evidence introduced which showed that either or both of the defendants were in San Francisco on May 1, 1923, or that both or either of the defendants conspired with divers other persons who were in San Francisco on that date or any date to POSSESS any drugs. There was no overt act charged in the indictment of possessing a baggage check at Reno, Nevada, on May 3, 1922, or of receiving a fictitious registered letter addressed to one F. T. Henry in San Francisco, on May 9, 1922; in fact, there is no proof whatsoever of any overt act, let alone proving THAT THE DEFENDANTS UNLAWFULLY POSSESSED NARCOTIC DRUGS AT SAN FRANCISCO ON MAY 1ST. By stretching the imagination to the utmost degree, the only thing proven by the evidence of any overt act was:

(a) The checking of a suitcase at Oakland, California, on May 2, 1922, by an unknown person who signed a valuation certificate, F. T. Henry, NOT IN THE HANDWRITING OF EITHER OF THE TWO DEFENDANTS.

(b) The mailing of a registered letter from Stockton, California, on May 2, 1922, by some unknown person.

(c) The delivery of an OPENED registered letter at a store where Gee Sue Tom happened to be at the time the Government officers had the letter delivered at the WRONG ADDRESS, in Reno, Nevada.

(d) The finding of a railroad ticket sold at Oakland, California, on May 1, 1922, which had

not been used up to and including May 9, 1922, on the person of Hon Won Chong, and the searching of the persons and places of, and where each of the defendants were at the time they were arrested, and not finding any non-taxpaid narcotic drugs, and

(e) Securing a statement from Hon Won Chong that he had been in Bakersfield, California..

Essential 5. Guilty intent present in the minds of the conspirators.

There was no evidence introduced either circumstantial or direct, whereby any intent, let alone guilty intent, was shown to have been present in the minds of either of these defendants. In fine, the evidence is absolutely conclusive that the defendants had never seen each other, had never communicated with each other, or with any person known by them, nor had they ever been in the same State at the same time with each other. The evidence actually shows that Hon Won Chong was not in San Francisco on May 1st, 2nd, 3rd, 4th or 5th, but that he was in Vallejo, California, until May 9th; that some person other than Hon Won Chong checked the suitcase at Oakland, California, on May 2, 1922, and signed a valuation slip which valuation slip contained the signature of F. T. Henry, AND WAS NOT IN THE SAME HANDWRITING AS APPEARS ON THE REGISTRY RECEIPT, SIGNED BY HON WON CHONG FOR F. T. HENRY, IN THE PRESENCE OF GOVERNMENT WITNESSES.

That the letter delivered by the Government officials to Gee Sue Tom at Reno, Nevada, was mailed

at Stockton, California, on May 2, 1922, and that the baggage check was never ACTUALLY in the possession of either of these defendants but was only constructively in the possession of Gee Sue Tom for a very few moments when it was taken from the envelope by a Government officer.

GUILTY INTENT is a necessary element of the crime of conspiracy. Ordinarily, of course, the intent will be inferred from the nature of the combination, but in this case there was no evidence introduced throughout the whole trial to show a combination of any kind, either by circumstantial or inferential evidence, nor was any evidence introduced to show that either of these two defendants had combined with divers other persons unknown to the other. As a necessary or usual consequence, an inference is irresistible from evidence introduced to show a combination of some kind to commit a conspiracy. The actual criminal or wrongful purpose must accompany the agreement, and if that is absent, the crime of conspiracy has not been committed, but there must always be an agreement proven by at least SOME evidence.

2. That the evidence fails to prove that the defendants Gee Sue Tom or Hon Won Chong were at any time connected with the, or any conspiracy, as charged in the indictment.

The only connection of Gee Sue Tom with the attempted conspiracy was that he was the recipient of a registered envelope mailed from Stockton, California, to Gee Toy, Reno, Nevada, which envelope contained the passenger portion of a baggage check No. 409250

which corresponded with the other portion of a baggage check attached to a suitcase procured at the Western Pacific baggage room by the Government officers (not Gee Sue Tom) which suitcase contained nontaxpaid narcotic drugs. The baggage check was never ACTUALLY in the possession of Gee Sue Tom, but was only CONSTRUCTIVELY so, for the brief period of a few seconds. The indictment charges UNLAWFUL POSSESSION of narcotic drugs at San Francisco, on or about May 1, 1922. The evidence does not show conspiracy to possess narcotic drugs at San Francisco, but only shows TRANSPORTATION *to* RENO, not POSSESSION *at* RENO. The envelope was addressed to Gee Toy, 129 FIRST Street and not 129 FRONT Street; because 129 First Street was a residential district, is no reason why there could not have been a Gee Toy residing there.

The evidence also showed that Gee Toy was not the owner of the Chu Kee Co., but the store was owned by Gee Fox Song, Gee Sue Tom's brother-in-law, who had at one time served a jail sentence. Gee Sue Tom had not been in San Francisco since September, 1921, while Hon Won Chong only came from China to San Francisco on March 15, 1922. There was no evidence introduced at all, showing that these two defendants had ever communicated with each other in any manner. No letters, telegrams, telephone messages, or other writings were shown to have been in either of their handwritings.

The only connection of Hon Won Chong with a conspiracy attempted to be proven by the Govern-

ment was that he received a fictitious registered letter addressed to F. T. Henry, 38 Stockton Street, San Francisco, California, and that by his having in his possession a railroad ticket, which had expired, and which was supposed to be the ticket upon which the suitcase, containing the narcotics, was checked from Oakland to Reno, connected him definitely with the unlawful POSSESSION of narcotics, non-taxpaid at San Francisco on May 1, 1922; while as a fact, the evidence introduced can only be construed as meaning that there was an unlawful transportation; therefore, there is a fatal variance between the allegation in the indictment and the evidence introduced.

3. That the evidence does not tend to prove that the defendants Gee Sue Tom or Hon Won Chong were guilty in the manner and form as charged in the indictment, or at all.

The indictment charges a conspiracy to unlawfully POSSESS narcotic drugs at San Francisco on May 1, 1922. The evidence introduced shows that some unknown and unidentified parties checked a suitcase from Oakland, California, on May 1, 1922, to Reno, Nevada, which suitcase had never been claimed by anyone but was taken into custody by the Government officers before the claimant or owner of the suitcase appeared. That a registered letter was delivered to a WRONG address, and that Gee Sue Tom was immediately arrested after the delivery of the registered letter, and before he had had an opportunity to open the said letter. The Court's instructions that

> "possession of a baggage check entitling him to the possession of a suitcase containing drugs with

> knowledge of the contents, and intent to procure the suitcase is in law POSSESSION OF THE DRUGS,"

would, if anything, only show unlawful possession CONSTRUCTIVELY and not ACTUALLY, and the possession would be at Reno, Nevada, and not San Francisco, California, as is alleged and charged in the indictment; therefore the evidence showed, if it showed anything, only unlawful *transportation* and there could have been no possession until after the baggage had been procured by producing the check at the railway station, and receiving the suitcase. We have here a variance which is fatal.

A few extracts from the opinions of the Courts will suffice to show the rule of law on this point.

> "At the close of the plaintiff's (Government) case, move the court to instruct the jury that the evidence introduced * * * is not sufficient to warrant the jury in finding a verdict in his favor; and it is held that such a motion is not one addressed to the discretion of the court, BUT THAT IT PRESENTS A QUESTION OF LAW, and that it is as much the subject of exceptions as any other ruling of the court in the course of the trial."

Mercantile Ins. Co. v. *Folsom,* 18 Wall. 250;
Schuchardt v. *Allen,* 1 Wall, 370;
Bliven v. *N. Eng. Screw Co.,* 23 Howard 362.

In *Hickman* v. *Jones,* 9 Wall. 201, the Court said:

> "Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error."

In *King* v. *Delaware Insurance Co.,* 6 Cranch 71, the Court said:

> "An improper direction of verdict, or a refusal thereof is reversible error. THE QUESTION OF WHETHER OR NOT THE COURT ERRED IN REFUSING TO DIRECT A VERDICT IS A QUESTION OF LAW, not facts * * * the case then is open to examination on its real merits."

In *Parsons* v. *Bedford,* 3 Peter 433, the Court said:

> "The party may bring the facts into review, before the Appellate Court, so far as they bear upon questions of law by a bill of exceptions."

In *Suidam* v. *Wilson,* 20 Howard 427, the Court said:

> "Where the record contains a bill of exceptions the operation of a writ of error is not confined to that portion of the record. If error is apparent from any part of the record, it is open to review, whether it is found in the bill of exceptions or elsewhere."

In *Lancester* v. *Collins,* 115 U. S. 222, 225, the Court said:

> "The court cannot review the WEIGHT of the evidence, but can look into it to see whether it was error in not directing the verdict for the plaintiff on the QUESTION OF VARIANCE, OR BECAUSE THERE WAS NO EVIDENCE TO SUSTAIN THE VERDICT."

In *Hepburn* v. *Du Bois,* 12 Peters 345, the Court said:

> "Plaintiff in error has a right to demand of a court of review that they look at the evidence for only one purpose; to ascertain whether it was

sufficient in law to authorize the jury to find the facts which made out the right of the party on a part or whole of the case."

It is earnestly urged that the trial Court committed manifest error in refusing to grant the motion for a directed verdict on behalf of plaintiffs in error, which motion was made at the conclusion of the Government's case in chief, thereafter renewed when all the evidence was in, and again renewed after the order of consolidation was permitted.

The above assignments of error, in this respect, involve a consideration of all the evidence in the case included in the bill of exceptions, as to whether the plaintiffs in error have been sufficiently connected with the conspiracy set out in the indictment, and sufficient proof, in law, was introduced by the Government to uphold the verdict and judgment rendered against them.

II.

That the Court Erred in Making, Giving and Rendering Judgment Against the Defendants for the Reason That Said Indictment Does Not State Any Crime or Any Offense Against Any Law of the United States, and for the Reasons Taken and Assigned by the Defendants in Their Motion in Arrest of Judgment.

ARGUMENT.

No Crime Is Set Forth in the Indictment.

The indictment does not state facts sufficient in law to constitute a crime or public offense against the United States. This point is raised by the demurrer *ore tenus* interposed by the plaintiffs in error, on file

in the cause, which was ordered overruled and to which an assignment of error was duly made. (Tr. p. 33.) It is raised by plaintiffs in error's request for motion for a directed verdict of not guilty, made at the conclusion of the Government's case, and thereafter renewed when all the evidence was in. (Tr. pp. 35, 37, 41, 43.) It was also made by plaintiffs in error before judgment by their motion in arrest of judgment, to which an assignment of error was also made. (Tr. pp. 45 and 49.)

The indictment, or indictments, contain but one count, and they are defective for the reason that they fail to show that plaintiffs in error are one of the class required by Section 1 of the Act specified in the indictments, to register and pay a tax. The first clause of Section 1 of the Act of Congress of February 24, 1919, as also the Act of December 17, 1914, is as follows:

> "That on or before July 1st of each year, every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the Collector of Internal Revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided:"
>
> Barnes Fed. Code (Suppl. 1921), p. 174;
> Barnes Fed. Code (1919), pp. 1328 et seq.;
> Secs. 1-38, U. S. Statutes at Large, p. 785.

Section 1 of the Act of December 17, 1914, is designated as Section 5452 of Barnes' Federal Code; Section 8 as 5459, and Section 9 as 5460. The Act of

February 24, 1919, amended Sections 5452 and 5457, as set forth in said Code, which are Sections 1 and 6 of 38 United States Statutes at Large, but left Sections 5459 and 5460 undisturbed. In other words, Sections 8 and 9 of the "Harrison Anti-Narcotic Act," as amended, are the original sections of the Act of December 17, 1914. There are additional requirements in Section 1 of the Act, as amended, new crimes set forth, for which the same penalty set forth in Section 9 of the Act of December 17, 1914, is prescribed, but in other respects Section 1 in the Act, as amended, is not materially different from the original Act.

The indictment, or indictments, does not allege that the plaintiffs in error are importers, manufacturers, producers, compounders, sellers, dealers in, dispensers or givers away of opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, BUT INDULGES IN THE BALD CONCLUSION OF LAW THAT THEY ARE PERSONS REQUIRED TO REGISTER AND PAY A TAX.

It has been held that Section 8 of the original "Harrison Anti-Narcotic Act" applies only to those persons specified in the first clause of the first section of said Act, and it has also been held that Section 8 of the Act, as amended, applies only to the same class.

United States v. *Jin Fuey Moy,* 241 U. S. 394 to 402;
Pendleton v. *U. S.,* 290 Fed. 388;
Advance Sheets, Vol. 290, Fed. No. 2, p. 388, Sept. 20, 1923.

According to these authorities, plaintiffs in error are not within the provisions of Section 8 of the Act because they were merely, actually or constructively, in possession of the narcotics and had not registered and paid the special tax, *by adding the conclusion of law that they were required to register.* The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and the cause of the accusation."

To say that they were persons required to register did not inform them of the nature and the cause of the accusation.

Plaintiffs in error were entitled to know from the indictment, or indictments, whether they were accused as importers, manufacturers, producers, compounders, sellers, dealers in, dispensers or givers away of the narcotics mentioned in the indictment in order to prepare their defense and to save them from possible double jeopardy. This information was denied the defendants and we respectfully submit that the lower Court erred in so doing.

The indictment, or indictments, should have particularly designated to which one of the classes of those required to register they belonged. The conclusion of law that they were such persons required to register is too vague and uncertain and as such it is insufficient.

U. S. v. *Cruikshank,* 92 U. S. 542;
U. S. v. *Carll,* 105 U. S. 611.

It follows, therefore, that upon the authority of the rulings in the cases of *Jin Fuey Moy,* 241 U. S. 394, *Pendleton* v. *U. S.,* 290 Fed. 388; *U. S.* v. *Wilson,* 225 Fed. 82, that the indictment, and the consolidated indictments, against the plaintiffs in error charges no crime at all, and from the rulings in *U. S.* v. *Hess,* 124 U. S. 483; *U. S.* v. *Carll,* 105 U. S. 611, *U. S.* v. *Simmons,* 96 U. S. 360, *Dowling* v. *U S.,* 278 Fed. 633, and the other cases cited, that the plaintiffs in error cannot be charged with other offenses by inference or intendment, when such offenses are not pleaded with such precision as to inform the plaintiffs in error of the nature of the charge against them so that they may be protected in their rights; and the lower Court committed reversible error in overruling the demurrer, *ore tenus,* in denying their motion for a directed verdict, and in denying their motion in arrest of judgment and in sentencing them to prison.

The rule of law laid down in the Jin Fuey Moy case, 241 U. S. 394, has been upheld by this Court in the recent decision of *Gustave Johnson* v. *U. S.,* No. 4077, unreported, but filed January 21, 1924.

It is contended, on behalf of the plaintiffs in error, that, under these assignments of error, the judgment of conviction should be reversed upon three grounds:

(1) That the ESSENTIALS of the crime of conspiracy were not proven, and

(2) There is a fatal variance between the allegation of unlawful POSSESSION and the proof of unlawful TRANSPORTATION, and

(3) There is no crime set forth in indictment 11132, or consolidated indictments 11785 and 11132.

CONCLUSION.

From the foregoing it will be seen that there was no evidence introduced by the Government sufficient to warrant the case going to a jury, and a QUESTION OF LAW is presented to this Court in applying the facts to the ESSENTIALS OF THE CRIME OF CONSPIRACY. As the ESSENTIALS have not been met by the evidence introduced by the Government; and as the indictments do not state facts sufficient in law to constitute a crime or public offense against the United States, it is urged that the judgment should be reversed.

Respectfully submitted,

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Hon Won Chong.

San Francisco, Cal., February 8, 1924.